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U.S. Bankruptcy Appellate Panel of the Tenth Circuit

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NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE ELLIN WYNN, doing business as Robbers' Roost Ranch, Debtor.	BAP No. WO-02-010
JEFFREY JOHN JONES and DENISE R. JONES, Appellants, v. ELLIN WYNN, doing business as Robbers' Roost Ranch, and LORI WILLIAMS-DEKALB, Chapter 12 Trustee, Appellees.	Bankr. No. 01-17641-WV Chapter 12 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the Western District of Oklahoma

Before McFEELEY, Chief Judge, BOULDEN, and NUGENT, Bankruptcy Judges.

BOULDEN, Bankruptcy Judge.

The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. The case

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

is therefore ordered submitted without oral argument.[1]

Jeffery John and Denise R. Jones (Creditors) appeal an order of the United States Bankruptcy Court for the Western District of Oklahoma sustaining the objection of the Chapter 12 debtor (Debtor) to their proof of claim and disallowing the claim in its entirety. For the reasons set forth below, we AFFIRM.

I. Background

In 1988, the Debtor and her spouse purchased approximately 7,200 acres of real property in Medicine Bow, Wyoming. The couple and their son engaged in a farming and ranching business on the property under the name "Robbers' Roost Ranch."

The Creditors commenced a civil action in Wyoming state court, naming the Debtor, her spouse, her son and three other individuals and several business entities as defendants (Wyoming Action). The Debtor, her spouse and her son are referred in the Wyoming Action as the "Wynn Defendants." In 1997, a judgment was entered in the Wyoming Action against, among others, the Wynn Defendants, awarding the Creditors $50,000, plus attorneys' fees and costs (1997 Judgment). The 1997 Judgment was appealed to the Wyoming Supreme Court.

Prior to a ruling in the appeal of the 1997 Judgment, the Creditors filed a motion seeking to determine the amount of attorneys' fees and costs awarded to them in the Wyoming Action. The Wynn Defendants objected, claiming that the fees and costs sought should be in a lesser amount. The state trial court sustained the objection, awarding the Creditors the fees and costs as argued by the Wynn Defendants: $20,805.83 in fees and $1,340.57 in costs, for a total award of $22,146.40 (1998 Fee

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[1] The Notice of Appeal lists the Chapter 12 trustee as a party to this appeal. Since the Chapter 12 trustee did not file a notice of appeal, she has been designated as an "Appellee." However, we note that the Chapter 12 trustee did not make an appearance at hearings related to this appeal, she did not file any papers in the case relevant to the matters on appeal, and she did not enter an appearance in this appeal.

The Court grants the unopposed "Motion to Supplement Amended Appendix" filed by the Appellants. The papers filed with that Motion have been included in the record on appeal.

Award). But, the court stayed the 1998 Fee Award pending appeal, stating: "No Judgment shall be entered on costs and attorney's fees until a return of the record . . . from the Wyoming Supreme Court . . . ." 1998 Fee Award at 2, *in* Appellants' Appendix at 61.

In 1999, the Wyoming Supreme Court entered an order affirming the 1997 Judgment, but the Creditors took no action to obtain a judgment related to the 1998 Fee Award. At some point, Employers Reinsurance Corporation (ERC) paid the Creditors $50,000 plus interest on the 1997 Judgment on behalf of the Wynn Defendants, but it did not pay the Creditors any portion of the 1998 Fee Award.

In July 2001, the Debtor filed a Chapter 12 petition in the Western District of Oklahoma, naming herself as the debtor, doing business as "Robbers' Roost Ranch." At this point, the Debtor's spouse had died, and she was the sole owner of the Ranch. The bankruptcy notice in the Chapter 12 case set August 29, 2001, as the date for the first meeting of creditors required under 11 U.S.C. § 341, and November 27, 2001, was set as the deadline for non-governmental entities to file proofs of claim (November Claims Bar Date).

The Debtor listed the Creditors in her Schedule F as the holders of a disputed, general unsecured claim in the amount of $72,150 for the 1997 Judgment plus interest. The 1997 Judgment is also disclosed in the Debtor's Statement of Financial Affairs. The 1998 Fee Award is not listed in the Debtor's Schedules. ERC is listed as a general unsecured creditor holding a disputed claim in the amount of $72,413.83, this being the amount it paid on the 1997 Judgment.

The Debtor's Chapter 12 plan of reorganization classified the Creditors' scheduled claim in Class IV, stating that it was a "disallowed" claim. Chapter 12 Plan at 7, *in* Appellants' Amended Appendix at 39. The Debtor classified ERC as the holder of an allowed unsecured claim in the amount of $27,456.50, providing for semi-annual payments under the plan in the amount of $4,576. In addition, the Debtor

proposed to continue to pay ERC $763 each month.

On November 26, 2001, four months after the Debtor filed her Chapter 12 petition, a "Judgment Nunc Pro Tunc Awarding Attorney's Fees and Costs to Plaintiff [sic]" (Fee Judgment) was entered by the state court in the Wyoming Action. The Fee Judgment is a judgment related to the state court's 1998 Fee Award, allowing the Creditors $22,146.40 in fees and costs nunc pro tunc to August 4, 1999, the date that the Wyoming Supreme Court apparently affirmed the 1997 Judgment. The Fee Judgment set prejudgment interest in the amount of 7% per annum and post-judgment interest in the amount of 10% per annum.[2]

On December 6, 2001, several days after the expiration of the November Claims Bar Date, the Creditors filed a proof of claim in the Debtor's Chapter 12 case, asserting a general unsecured claim for the 1998 Fee Award. It is undisputed that the Creditors' proof of claim was the first paper that they filed in the Debtor's Chapter 12 case.[3]

The Debtor objected to the Creditors' proof of claim, arguing (1) she did not owe the claim, (2) the claim was barred because the Creditors did not timely request fees and costs in the Wyoming Action and it was filed after the November Claims Bar Date, and (3) the Fee Judgment was entered in violation of the automatic stay. The Creditors responded to the Debtor's objection, admitting that their proof of claim was not timely filed. They argued that their proof of claim should nonetheless be allowed under theories of informal proof of claim and excusable neglect. The Debtor replied to the Creditors' response, reaffirming its previous arguments.

After a hearing, the bankruptcy court sustained the Debtor's objection,

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[2] The Creditors did not request relief from stay to obtain the Fee Judgment. Shortly after the Fee Judgment was entered in the Wyoming Action, the Debtor filed a motion in the bankruptcy court against the Creditors seeking sanctions for their alleged violation of the stay, but this motion was later withdrawn by the Debtor. The Debtor states that the Fee Judgment was vacated in January 2002, but there are no documents in the record to confirm this fact.

[3] Apparently, the Creditors did not assert a claim for the $50,000 awarded in the 1997 Judgment because ERC paid that Judgment.

disallowing the Creditors' proof of claim in its entirety because it was not filed prior to the November Claims Bar Date and no informal proof of claim had been filed prior to the November Claims Bar Date. It also held that the time to file a proof of claim could not be extended due to the Creditors' excusable neglect, because excusable neglect is not grounds for enlarging the time to file a proof of claim in a Chapter 12 case. Fed. R. Bankr. P. 3002(c) and 9006(b)(3); *Jones v. Arross*, 9 F.3d 79 (10th Cir. 1993).

This appeal followed.[4] We have jurisdiction over the appeal because the Creditors timely filed a notice of appeal from the bankruptcy court's "final" order disallowing their proof of claim. 28 U.S.C. § 158(a)(1); Fed. R. Bankr. P. 8002(a). Furthermore, the parties have consented to this Court's jurisdiction because they have not elected to have the appeal heard by the United States District Court for the Western District of Oklahoma. 28 U.S.C. § 158(c); Fed. R. Bankr. P. 8001(e).

II. Discussion

Section 502(b) of title 11 of the United States Code states that the bankruptcy court "shall allow" a claim that has been objected to, "except to the extent that . . . proof of such claim is not timely filed . . . ." 11 U.S.C. § 502(b)(9). Federal Rule of Bankruptcy Procedure 3002 implements § 502(b)(9), stating that:

> (a) *Necessity for Filing*. An unsecured creditor . . . must file a proof of claim . . . for the claim . . . to be allowed . . . .
>
> . . . .
>
> (c) *Time for Filing*. In a . . . chapter 12 family farmer's debt adjustment . . . a proof of claim is timely filed if it is filed not later than 90 days after the first date set for the meeting of creditors called under § 341(a) of the Code . . . .

Fed. R. Bankr. P. 3002(a) & (c). The time for filing a proof of claim under Rule

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[4] After filing a notice of appeal, the Creditors sought to stay the confirmation of the Debtor's Chapter 12 plan pending appeal. The Chapter 12 trustee and the Debtor objected to that motion, and it was denied by the bankruptcy court. An order confirming the Debtor's Chapter 12 plan was entered by the bankruptcy court on March 13, 2002. A copy of the confirmed plan is not part of the appellate record.

3002(c) may not be enlarged except "to the extent and under the conditions stated in [that] rule[]." *Id.* at 9006(b)(3); *see Jones*, 9 F.3d at 81. Based on the express language of § 502(b)(9) and Rules 3002 and 9006(b)(3), and the facts and admissions in this case, the bankruptcy court's order disallowing the Creditors' late-filed proof of claim must be affirmed.

The bankruptcy court's notice of bankruptcy in the Debtor's case correctly set the November Claims Bar Date under Rule 3002(c). The Creditors admit that they were served with the bankruptcy notice, and that they failed to file a proof of claim prior to the expiration of the November Claims Bar Date. They have not argued that any exceptions stated in § 502(b)(9) apply to allow their untimely proof of claim, nor have they argued that any exceptions stated in Rule 3002 apply to enlarge the November Claims Bar Date as allowed under Rule 9006(b)(3). Finally, the Creditors concede that the bankruptcy court did not err in failing to extend the November Claims Bar Date due to their alleged excusable neglect.

The Creditors, however, argue that the bankruptcy court erred in disallowing their untimely-filed proof of claim because it amended a timely-filed informal proof of claim. As correctly held by the bankruptcy court and as admitted by the Creditors, the controlling authority on the allowance of informal proofs of claim is *Clark v. Valley Fed. Sav. & Loan Ass'n (In re Reliance Equities, Inc.)*, 966 F.2d 1338 (10th Cir. 1992). *See* Appellants' Brief at 6.

In *Reliance Equities*, an unsecured creditor filed a proof of claim against the Chapter 7 debtor's estate one day after the claims bar date expired. The bankruptcy court disallowed the proof of claim, and it was affirmed by the district court. The United States Court of Appeals of the Tenth Circuit affirmed the lower court, stating:

> A proof of claim in a Chapter 7 liquidation must be filed within 90 days after the first date set for the creditors' meeting. Bankr. R. 3002(c). This provision "is in the nature of a statute of limitations." *In re Casterline*, 51 B.R. 219, 220 (Bankr. D. Colo. 1985) (citations omitted). In the case at hand, the first date set for the creditors' meeting was September 10, 1987, so the bar date for filing claims against the

> estate was December 9, 1987. Although Mid Valley received notice of the bankruptcy within a week after the filing, Mid Valley did not file a formal proof of claim until December 10, 1987. . . .
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> . . . .
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> The bankruptcy courts in Colorado follow a five-prong test with respect to informal proofs of claim:
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> 1. the proof of claim must be in writing;
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> 2. the writing must contain a demand by the creditor on the debtor's estate;
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> 3. the writing must express an intent to hold the debtor liable for the debt;
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> 4. the proof of claim must be filed with the Bankruptcy Court; and
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> 5. based on the facts of the case, it would be equitable to allow the amendment.
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> *In re Bowers*, 104 B.R. 362, 364 (Bankr. D. Colo. 1989). Here, no writing existed, the creditor filed nothing with the bankruptcy court, and the equities do not favor protecting a financial organization that had numerous opportunities to protect itself. Mid Valley's oral claim was thus insufficient under *Bowers*.
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> Furthermore, a trustee's knowledge of a claim does not constitute an adequate informal claim, and bankruptcy courts will not ordinarily allow filing of a proof of claim after the claim bar date. Yet, Mid Valley offers no reasons for special treatment in this case except that the Trustee had notice of the claim and that the claim was filed only a day late. Indeed, Mid Valley recognized in its brief that these excuses are insufficient as a matter of law.

966 F.2d at 1345 (citation omitted).

Applying this test, the bankruptcy court did not err in holding that the Creditors failed to make a timely informal proof of claim to which their tardily-filed formal proof of claim could relate back. Specifically, prior to the late filing of their formal proof of claim, the Creditors did not file *any* paper in the bankruptcy court, much less one making a written demand on the Debtor's estate or asserting an intent to hold the Debtor liable. Thus, there was no timely informal proof of claim.

The Creditors maintain that an informal proof of claim existed, because the Debtor was aware that they held a claim against her. This argument is without merit

because the Tenth Circuit expressly stated in *Reliance Equities* that a Chapter 7 trustee's "knowledge of a claim does not constitute an adequate informal claim . . . ." *Id*. This rationale must extend to a Chapter 12 debtor's knowledge of a claim, such as the Debtor's knowledge of the Creditors' claim in this case. Furthermore, knowledge of a claim alone will not suffice to create an informal proof of claim, because *Reliance Equities* requires the filing of a writing in the bankruptcy court.

The Creditors also argue that the Fee Judgment, which was obtained prior to the expiration of the November Claims Bar Date, as well as the Debtor's admissions related to the claim in her Schedules and proposed plan constitute timely-filed informal proofs of claim. These arguments fail because the Fee Judgment was not filed with the bankruptcy court prior to the expiration of the November Claims Bar Date and, therefore, cannot serve as an informal proof of claim under the *Reliance Equities* test. In addition, the Debtor's statements in her Schedules and proposed plan were based on the 1997 Judgment, not the 1998 Fee Award asserted in the Creditors' proof of claim. To the extent that the 1998 Fee Award is mentioned in the Debtor's proposed plan, it is treated as a disallowed claim. Most importantly, however, is the fact that even if the statements in the Debtor's Schedules and proposed plan acknowledge a debt related to the 1998 Fee Award, they are not informal proofs of claim on behalf of the Creditors, because they were made by the *Debtor*, not the Creditors. Thus, the statements do not "contain a demand by the Creditor[s] on the debtor's estate" or express the Creditors' "intent to hold the debtor liable for the debt[.]" *Id*.

Finally, the Creditors contend that the bankruptcy court erred in disallowing their untimely-filed proof of claim given the equities of the case. In addressing this argument, we acknowledge that the fifth element of the informal proof of claim test in *Reliance Equities* refers to consideration of the equities of the case. However, an equitable test only applies to determine whether a late-filed proof of claim may be allowed to amend a timely-filed writing argued to be an informal proof of claim. Here, there was no timely-

filed informal proof of claim and thus, the fifth element of the *Reliance Equities* test is inapplicable.

In so holding we note that the last two paragraphs of the above-quoted passage from *Reliance Equities* could be construed as a statement that bankruptcy courts may take the equities of a case in account to allow an untimely-filed proof of claim. Any confusion in *Reliance Equities*, however, is put to rest by *Jones*, 9 F.3d at 81, where the Tenth Circuit ruled that equitable considerations do not apply to enlarge the claims bar date under Rule 3002(c). In *Jones*, a creditor who had not received notice of the debtor's Chapter 12 case sought leave to file an untimely proof of claim. The bankruptcy court allowed the untimely claim, and the district court affirmed. The Tenth Circuit reversed, holding that Rule 3002(c) requires that a proof of claim be filed within ninety days of the meeting of creditors, and that time may not be expanded except to the extent expressly stated in that Rule.

But, even assuming that equitable considerations apply to an analysis of the allowance of a late-filed proof of claim in a Chapter 12 case, the bankruptcy court's decision to disallow the Creditors' late-filed proof of claim was not erroneous. Applying equitable considerations, this Court could reverse the bankruptcy court only if its order disallowing the Creditors' proof of claim was based on factual findings that are clearly erroneous, or its conclusion, while based on facts supported by the record, is an abuse of discretion. Fed. R. Bankr. P. 8013 (factual findings reviewed under clearly erroneous standard of review); *see In re Tanaka Bros. Farms, Inc.*, 36 F.3d 996, 998 (10th Cir. 1994) (bankruptcy court's decision to disallow an amended proof of claim reviewed for abuse of discretion) (citing *Unioil v. Elledge (In re Unioil, Inc.)*, 962 F.2d 988, 992 (10th Cir. 1992)), *cited in In re Antonich*, No. WO-99-031, 1999 WL 1295498, at * 2 (10th Cir. BAP Dec. 14, 1999) (bankruptcy court's disallowance of an informal proof of claim under the *Reliance Equities* equitable test reviewed for abuse of discretion); *In re Drew*, 256 B.R. 799, 804 (10th Cir. BAP

2001) (recognizing that bankruptcy court had discretion to allow late-filed proofs of claim under former Fed. R. Bankr. P. 3002(c)(6) and decision thereunder is reviewed for abuse of discretion). The Creditors do not take issue with any of the bankruptcy court's factual findings, but rather state that the uncontested facts weigh in favor of allowing their late-filed proof of claim. Specifically, they maintain that their untimely proof of claim should be allowed because it was filed only nine days after the expiration of the November Claims Bar Date, the bar date for filing proofs of claim by governmental units had not expired, the Debtor's plan had not been confirmed, and the Debtor knew of their claim. Considering these facts, we cannot say that the bankruptcy court abused its discretion in disallowing the Creditors' late-filed proof of claim because we do not have "'a definite and firm conviction that the [bankruptcy] court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.'" *Moothart v. Bell*, 21 F.3d 1499, 1504 (10th Cir. 1994) (quoting *McEwen v. City of Norman*, 926 F.2d 1539, 1553-54 (10th Cir. 1991)). Indeed, in *Reliance Equities* the Tenth Circuit affirmed the disallowance of a proof of claim where the Chapter 7 trustee was alleged to have been "well aware of the nature and extent of [the creditor's] claim prior to the claim bar date[,]" and the proof of claim was filed only one day late. *Reliance Equities*, 966 F.2d at 1345.

III. Conclusion

For the reasons stated above, the bankruptcy court's order is AFFIRMED.